No. 17-9560

IN THE

Supreme Court of the United States

HAMID MOHAMED AHMED ALI REHAIF,
Petitioner,

v.

UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL IMMIGRANT JUSTICE CENTER IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

Amicus National Immigrant Justice Center (NIJC) is a non-profit legal service provider that represents immigrants and asylum-seekers. NIJC collaborates with more than 1500 pro bono attorneys to represent thousands of immigrants and asylum-seekers annually. NIJC also advises federal defenders and defense counsel on immigration matters relevant to their clients. NIJC represents hundreds of noncitizens whose presence is "authorized" by statute and pursuant to agency rule, but whose precise "status" under the law is unclear.[1]

SUMMARY OF THE AMICUS ARGUMENT

Under the Court's case law, whether immigration rules are "confusing" appears relevant to the *mens rea* calculus for 18 U.S.C. § 922(g)(5)(A). Amicus therefore writes to outline some of the complexities of immigration law as it would affect this matter.

Amicus begins by describing three related but distinct concepts under immigration laws relating to the legality of a noncitizen's presence "in" the United States. Unlawful presence, as defined in statute and elaborated in agency guidance, refers to whether a noncitizen is *authorized* to remain in the United States. Criminalized presence refers to circumstances where Congress has authorized punishment for a noncitizen's entry into, or presence within, the United

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[1] Pursuant to Rule 37.6 of the rules of this Court, amicus affirms that no counsel for a party authorized this brief in whole or in part and that no person other than amicus and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to this filing have been submitted to the Clerk.

States. The third concept—the one advanced by the Government—focuses on the concept of "status," i.e., whether a noncitizen is in a formal legal status in the United States. Status can be unlawful even where the noncitizen's presence is not criminalized, and where the stay is authorized by the agency, by statute, or by regulation.

Amicus explains a number of aspects of the Government's proposed approach that are particularly confusing. Authorized stays do not constitute lawful "status" even where those stays are permitted by statute and consciously allowed by the agency. Minor differences between generally indistinguishable situations can change a status from lawful to unlawful, or vice versa. Even long-term, functionally-permanent stays authorized by statute do not confer lawful status under the agency's rules (while less-permanent circumstances do). Moreover, agency rules allow immigration status to be granted or withdrawn retroactively, with as-yet unknown effects on criminal liability in the meantime. These complexities do not arise in unusual or rare circumstances; each of the situations outlined in the brief affect thousands to hundreds of thousands of individuals annually. Finally, Amicus explain that noncitizens are often innocently unaware of crucial facts that affect their legal status and could subject them to liability.

Amicus suggests that the Court may wish to consider alternative constructions for the "illegally or unlawfully in" element of § 922(g)(5)(A), because those alternatives would better accord with common linguistic usage and various principles of construction. Lenity principles also support that approach. The Government's approach imposes criminal liability for failure

to follow an agency's civil rules. Under the Court's case law, this is permissible only where Congress has spoken clearly. Here, where Congress did not explicitly make § 922(g)(5)(A) liability turn on adherence to agency rules or compliance with agency orders, precedent suggests that the statute not be read to do so implicitly. At a minimum, this line of cases supports Petitioner's view that any violation of agency rules must be knowing to trigger criminal liability.

In sum, the legality of a noncitizen's status or stay is often unclear, and even more frequently misunderstood. That is enough under the Court's precedent to require the Government to prove that any violation was "knowing" in order to subject them to criminal punishment.

ARGUMENT

I. AS INTERPRETED BELOW THE "ILLEGALLY OR UNLAWFULLY IN" ELEMENT IS CONFUSING IF NOT AMBIGUOUS.

The firearms statute prohibits possession by noncitizens who are "*illegally or unlawfully in* the United States." 18 U.S.C. § 922(g)(5)(A) (emphasis added). Amicus writes to explain that this text is—as understood by the lower court—confusing if not actually ambiguous. There are many circumstances that are unclear even to immigration lawyers.

A. "Illegal or unlawful" in this context could mean at least three distinct things.

Amicus sees at least three distinct ways in which the "illegally or unlawfully" element of § 922(g)(5)(A) might be understood.

First, § 922(g)(5)(A) could refer to the legality of "presence." The statute refers to someone being "in"

the United States. The word "in" is "an elastic preposition... expressing *presence*, existence, situation, inclusion, action." BLACK'S LAW DICTIONARY 683 (5th ed. 1979) (emphasis added). The Immigration and Nationality Act (INA) contains a definition of "unlawful presence." *See* 8 U.S.C. § 1182(a)(9)(B)(ii) (defining "unlawful presence").[2] Indeed, the lower court cited § 1182(a)(9)(B) in its decision. *U.S. v. Rehaif*, 888 F. 3d 1138, 1148 (11th Cir. 2018).

The unlawful presence definition excludes some categories of persons, including minors, asylum applicants, and victims of domestic abuse and human trafficking. *See* 8 U.S.C. § 1182(a)(9)(B)(iii). Moreover, unlawful presence is construed to exclude any "period of stay authorized by the Attorney General." 8 U.S.C. § 1182(a)(9)(B)(ii). Based on this exclusion, certain pending applications and situations keep a noncitizen from falling into unlawful presence.[3] For instance, a noncitizen who applies for asylum or other forms of relief is often permitted to remain inside the United States pending a decision, because Congress has

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[2] Unlawful presence is defined in 8 U.S.C. § 1182(a)(9)(B)(ii) "[f]or purposes of [that] paragraph." *Id.*

[3] The Agency designates some circumstances as a "period of stay authorized by the Attorney General," 8 U.S.C. § 1182(a)(9)(B)(ii), which are thereby excluded from and cannot constitute "unlawful presence" under § 1182(a)(9). *See generally* Donald Neufeld, Lori Scialabba, and Pearl Chang, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I)* (May 6, 2009), https://www.nafsa.org/uploadedFiles/uscis_consolidated_guidance.pdf?n=3976, modified in part by USCIS *Policy Memorandum PM-602-1060.1: Accrual of Unlawful Presence and F, J, and M Nonimmigrants* 1 (Aug. 9, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-08-09-PM-602-1060.1-Accrual-of-Unlawful-Presence-and-F-J-and-M-Nonimmigrants.pdf.

granted her the right to seek that relief. *See* 8 U.S.C. § 1158(a)(1) (asylum).[4] She would not accrue unlawful presence during the pendency of the application. (This would not protect her from detention at the discretion of the agency. 8 U.S.C. § 1226(a).)

Second, the statute could be construed as referring to criminalized presence, i.e., where a noncitizen's entry or presence violates the criminal law. Acts that are criminal in nature fit naturally within the meaning of "illegal or unlawful." *See, e.g.*, *Cordova-Soto v. Holder*, 659 F.3d 1029, 1034 (10th Cir. 2011) (finding procedurally proper entry "illegal" because counter to criminal law). Under the INA, entries "without inspection" (and certain other types of entries and presence) subject noncitizens to criminal prosecution. *See* 8 U.S.C. §§ 1325(a) (illegal entry), 1326 (illegal reentry). Notably, it is not a violation of federal criminal code for a noncitizen like Mr. Rehaif to remain in the United States longer than (or other than) permitted by a visa.[5]

The Government argues for a third approach, which focuses on legal "status." Regulations cited by the lower court adopt this approach. *See Rehaif*, 888 F. 3d at 1148; 27 C.F.R. § 478.11 ("Aliens who are unlawfully in the United States are not in valid immigrant, nonimmigrant or parole *status*.") (emphasis added).

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[4] This is both an expression of the nation's principles and a fulfillment of national treaty obligations. See 8 U.S.C. § 1231(b)(3); 19 U.S.T. 6223, 6259–6276, T.I.A.S. No. 6577 (1968); *see generally INS v. Stevic*, 467 U.S. 407, 416-17 (1984).

[5] Proposals to criminalize failure to timely depart after a nonimmigrant entry, *see Visa Overstay Enforcement Act of 2017*, H.R. 643, 115th Cong. § 2, have failed.

The Department of Homeland Security (DHS) distinguishes between "unlawful presence" and "unlawful status."

> DHS may permit an alien who is present in the United States unlawfully, but who has pending an application that stops the accrual of unlawful presence, to remain in the United States while that application is pending. In this sense, the alien's remaining can be said to be "authorized." However, the fact that the alien does not accrue unlawful presence does not mean that the alien's presence in the United States is actually lawful.
>
> **** [S]ome aliens who are actually present in an unlawful *status*, are, nevertheless, protected from accruing unlawful presence.

Donald Neufeld, Lori Scialabba, and Pearl Chang, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I)* 9, 10 (May 6, 2009), https://www.nafsa.org/uploadedFiles/uscis_consolidated_guidance.pdf?n=3976 (emphasis in original) (hereinafter "*Consolidation of Guidance*"), modified in part by USCIS *Policy Memorandum PM-602-1060.1: Accrual of Unlawful Presence and F, J, and M Nonimmigrants* 1 (Aug. 9, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-08-09-PM-602-1060.1-Accrual-of-Unlawful-Presence-and-F-J-and-M-Nonimmigrants.pdf.[6]

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[6] Indeed, the *Consolidation of Guidance* used an example close to the case at bar:

> An alien is admitted for "duration of status" as an F-1 nonimmigrant student. year later, the alien drops out of school, and

But the status question is not uncomplicated. For instance, a noncitizen who unlawfully entered the United States might thereafter be granted asylum, which would place her in lawful status. *See* 8 U.S.C. § 1158. Or, she might be granted withholding of removal, which prevents removal to the country in which persecution is feared. 8 U.S.C. § 1231(b)(3); *INS v. Stevic*, 467 U.S. 407, 421-24 (1984). As explained *infra* at 9-10, withholding is probably not considered lawful status by the agency.

Or a noncitizen may be granted Temporary Protected Status (TPS). DHS considers TPS to be lawful status. *Consolidation of Guidance* 27 ("If an alien's TPS application has been granted, the alien is deemed to be in lawful nonimmigrant status for the duration of the grant."). The Fifth Circuit agrees, finding that a noncitizen in TPS status cannot be prosecuted under § 922(g)(5)(A). *U.S. v. Orellana*, 405 F. 3d 360 (5th Cir. 2005); *compare U.S. v. Flores*, 404 F.3d 320 (5th Cir. 2005) (finding mere application for TPS did not grant status). It is not clear if all federal agencies agree with

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remains in the United States for one year after dropping out. The alien's status became unlawful when she dropped out of school. Neither USCIS nor an IJ ever makes a finding that the alien was out of status; therefore, she never accrues any unlawful presence for purposes of section 212(a)(9)(B) of the Act.... [T]he alien did not accrue unlawful presence despite the prior unlawful status, and so the alien is not inadmissible under section 212(a)(9)(B) of the Act."

Consolidation of Guidance 10-11. USCIS abrogated this part of the *Consolidation of Guidance*, citing in part the lower court's decision in this case. *Policy Memorandum PM-602-1060.1: Accrual of Unlawful Presence and F, J, and M Nonimmigrants, supra*, 2 n.2. Now, a student like Mr. Rehaif would begin to accrue unlawful presence immediately upon falling out of student status. *Id.*

this approach; the Board of Immigration Appeals (BIA) finds TPS consistent with entry of an order of removal. *Matter of Sosa-Ventura*, 25 I. & N. Dec. 391, 396 (B.I.A. 2010). At any rate, courts do not treat all temporary status like TPS; most temporary relief is not considered to be lawful status. *See Hussein v. INS*, 61 F.3d 377, 381 (5th Cir. 1995) (temporary stay of removal not a legal status); *United States v. Bazargan*, 992 F.2d 844, 848-49 (8th Cir. 1993) (employment authorization did not convey legal status). Whatever the merits of the agency's views on individual forms of relief, its answers are not instinctive or obvious (and less so for an unrepresented noncitizen).

To summarize, at least three distinct concepts address illegality of a noncitizen's stay in the United States. The unlawful *presence* definition turns largely on whether a noncitizen's stay is "authorized" or permitted. The *criminal* rules generally makes presence or entries unlawful where noncitizens enter without inspection. A noncitizen's legal *status* turns on the technical nature of the noncitizen's presence under the agency's rules and procedures. The lower court appeared to adopt the third approach, or an amalgam of the first and third approaches.

B. The confusing nature of immigration "status" or "presence" would support a *mens rea* requirement.

The Court generally presumes a scienter requirement for "each of the statutory elements that criminalize otherwise innocent conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994). Given that firearm possession is otherwise licit, the legality *vel non* of status or presence appears less like a juris-

dictional fact and more like something that "separate[s] those who understand the wrongful nature of their act from those who do not." *Id.* at 73 n.3.

However, the Court has found that the presumption of a scienter requirement carries less force when there is little "opportunity for reasonable mistake" about the element. *X-Citement Video*, 513 U.S. at 72 n. 2. Thus, the Court may find it relevant to consider the likelihood that a noncitizen may be mistaken as to the legality of their status or presence.

1. Authorized stay does not constitute lawful status.

It is sometimes clear whether a noncitizen is in lawful or unlawful status; but not always. For instance, even semi-permanent authorized stays are considered not to convey lawful "status" under the INA.

- Noncitizen A enters the United States without inspection and thereafter seeks asylum. His asylum claim is denied, but he is granted withholding of removal under 8 U.S.C. § 1231(b), because he is recognized to meet the refugee definition at 8 U.S.C. § 1101(a)(42)(A). He thereafter resides in the United States for a dozen years.

A noncitizen who enters this country without inspection immediately begins to accrue unlawful presence. 8 U.S.C. § 1182(a)(9)(B). Unlawful presence would stop during the pendency of a bona fide asylum application. 8 U.S.C. § 1182(a)(9)(B)(iii)(II); *Consolidation of Guidance* 29-30. The grant of withholding of removal would be considered a period of stay authorized by the Attorney General; Noncitizen A would thus accrue no unlawful presence after that grant. *Consolidation of Guidance* 42-43. However, withholding is not

considered lawful status by DHS; indeed, an order of removal must be entered at the time of the withholding grant. *Matter of I-S- & C-S-*, 24 I. & N. Dec. 432, 434-35 (B.I.A. 2008). Withholding does not convert into a more permanent status with the passage of time, nor do the regulations authorize withholding grantees to be issued travel documents. 8 C.F.R. §§ 223.1(b), 223.2(b)(2).

By contrast, a noncitizen in lawful "status" is considered to retain that status until a final order is entered terminating it. *Matter of Lok*, 18 I. & N. Dec. 101, 106-07 (B.I.A. 1981); 8 C.F.R. § 1001.1(p). Noncitizens who have not yet naturalized may be subject to removal for a wide variety of reasons. *See* 8 U.S.C. § 1227. If Noncitizen B obtains asylum, she is in lawful status, but may thereafter commit acts rendering her removable. For instance, Noncitizen B might pay a smuggler to facilitate the unlawful entry of her father, which would trigger removability under 8 U.S.C. § 1227(a)(1)(E). Even if Noncitizen B were amenable to removal from the United States, she would continue to be in lawful "status" until a final administrative removal order would be entered, after all appeals. *Lok*, 18 I. & N. Dec. at 106-07.

The fact that Noncitizen A's right to remain in the U.S. appears more secure than Noncitizen B's is—or so argues DHS—irrelevant to his legal status.

2. Situations that appear similar are treated differently.

The agency also makes distinctions that might appear unexpected. Cases that appear fundamentally similar are often treated differently.

For instance, consider a relatively common example.

- Noncitizen C enters the United States on a tourist visa, falls in love and gets married. She files an application for permanent resident status before her nonimmigrant status expires. See 8 U.S.C. § 1255(a). *Consolidation of Guidance* 10 (Example 2).

If Noncitizen C's application for permanent residence is granted, she assumes lawful status at that point. Even before then, she would accrue no unlawful presence while her application for permanent residence status is pending. *Consolidation of Guidance* 33-34. However, DHS would consider her to be in unlawful status upon expiration of her initial period of admission. *Id.* at 10.

By contrast, a small change in the example would result in a different answer.

- Noncitizen D is like Noncitizen C. But while her permanent residency application is pending, she obtains "advance parole" to briefly travel abroad to visit her mother who is sick. *See* 8 C.F.R. §§ 212.5(f), 245.2(a)(4)(ii)(A). On return, she is paroled into the United States on return to await adjudication of her application for permanent residency.

Noncitizen D, like Noncitizen C, did not accrue unlawful presence. But unlike Noncitizen C, by being paroled upon her return, she entered into a form of status. *See* 27 C.F.R. § 478.11 (referring to "parole"). While Noncitizen D and Noncitizen C may wait an equal time for adjudication of their residency applications, with the same likelihood of approval, Noncitizen C would be in unlawful "status" during that time, though both C and D were equally known to the Government and in otherwise equivalent positions.

3. Long-term stays authorized by statute and/or explicit agency decisions are not considered lawful "status."

DHS would reach this result even where statute or regulations authorize long-term stays, and where an agency action has explicitly approved them.

- Noncitizen E enters the United States on a tourist visa while still a minor. She becomes a victim of human trafficking. She eventually escapes and testifies against her smugglers, and is sponsored by a law enforcement agency for a "U visa" as a victim of specified crimes. 8 C.F.R. § 214.14(c)(2)(i). She is found eligible for a U visa, but due to annual quotas on U visas, she cannot be immediately granted a U visa until it is her turn in line. 8 C.F.R. § 214.14(d)(2). By regulation, while she waits her turn for a U Visa, she is granted deferred action and work authorization. 8 C.F.R. § 214.14(d)(2).

Noncitizen E would not accrue unlawful presence during her minority. 8 U.S.C. § 1182(a)(9)(B)(iii)(I). By regulation, individuals on the U visa "wait list" do not accrue unlawful presence. 8 C.F.R. § 214.14(d)(2). If Noncitizen E can show a connection between the trafficking or abuse and her entry, she might be able to avoid accruing any unlawful presence at all. 8 U.S.C. §§ 1182(a)(9)(B)(i)(IV), (V). However, until she is granted U visa status, her deferred action and work authorization do not place her into lawful "status" in DHS's eyes. The fact that Congress has explicitly authorized DHS to stay removal for people like her, 8

U.S.C. § 1227(d)(1), does not matter under DHS's analysis. *Consolidation of Guidance* 6-7 (listing stay grants under header of "Aliens Present in Unlawful Status Who Do Not Accrue Unlawful Presence").

This analysis applies regardless of the length of the stay, or the strength of the noncitizen's claims.

- Noncitizen F is brought to the United States as a young child, entering without inspection. After graduating high school and college, she seeks and is granted deferred action under the Deferred Action for Childhood Arrivals (DACA) program. *See Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 411-17 (E.D.N.Y. 2018) (describing history of DACA). She is also granted work authorization and is able to obtain post-graduation employment. Her employer files a visa petition on her behalf. She marries a U.S. citizen, who files a second visa petition for her.

Noncitizen F may be working with authorization and may appear headed toward permanent lawful status, but this is not relevant under the DHS calculus. Under that approach, her deferred action does not count as a status, so she remains in unlawful status.

4. Status can be restored or withdrawn retroactively.

Moreover, status is not necessarily fixed in time. In some circumstances, the immigration authorities approve or mandate retroactive shifts in status.

- Noncitizen G, a citizen of Canada, lawfully enters the United States as a nonimmigrant, not requiring a visa. She files an application for an extension or change of status before

> her initial status expires. 8 U.S.C. § 1258(a). It is pending for several months, during which time she goes to a shooting range. The extension application is approved some months later.

A timely extension motion is understood to prevent the noncitizen from accruing "unlawful presence"; and if the extension is granted, it retroactively confers lawful "status" through the earlier application point. *Consolidation of Guidance* at 37-38.

Legal liability under § 922(g)(5)(A) is thought to turn on whether the noncitizen was in lawful status *at the time* of the firearm possession. *See Orellana*, 405 F. 3d at 366. In this example, Noncitizen G could presumably, under the Government's view, be indicted for having a firearm. But Noncitizen G would appear to be absolved of liability by intervening agency action if the extension request is approved.

5. These ambiguities affect many thousands of people.

The examples outlined above are not unusual examples or "eggshell skull" cases. The number of people in the categories above ranges from thousands to the millions. These are not rare cases.

Temporary Protected Status currently covers over 417,000 individuals from 10 countries. *See* USCIS, *Total number of current I-821 Temporary Protected Status (TPS) individuals as of November 29, 2018*, https://www.uscis.gov/sites/default/files/files/native-documents/Total_number_of_current_I-821_Temporary_Protected_Status_TPS_individuals_as_of_November_29_2018.xlsx. Over 650,000 people apply every year for adjustment of status like Noncitizen C.

USCIS, *Agency Information Collection Activities*, 82 Fed. Reg. 24987, 24988 (May 31, 2017). Hundreds of thousands of people apply for advance parole, most while seeking permanent resident status, like Noncitizen D. *USCIS Advance Parole Documents: Fiscal Year 2016 Report to Congress* 2 (Jan. 6, 2017) ("USCIS received approximately 300,000 applications for advance parole documents each year. The majority of requests for advance parole documents comes from individuals seeking adjustment of status.").

Over 2,120,000 people have been granted deferred action under the DACA program since 2012, like Noncitizen F. *See* USCIS, *Number of Form I-821D, Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake and Case Status Fiscal Year 2012-2018* (September 30, 2018), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performance_data_fy2018_qtr4.pdf.

Even the less frequent examples above would affect many thousands of noncitizens.

The Government does not provide a precise number of people on the U visa waitlist, like Noncitizen E, but it is at least "thousands" and the waiting period is "years." USCIS Ombudsman, *Parole for Eligible U Visa Principal and Derivative Petitioners Residing Abroad* 1 (June 16, 2016), https://www.dhs.gov/sites/default/files/publications/cisomb-u-parole-recommendation-061616.pdf. For the past several years, over a thousand noncitizens have been have been granted withholding of re-

moval annually, like Noncitizen B. *See* U.S. Department of Justice, Executive Office for Immigration Review, *Statistics Yearbook FY2017*, 27 fig. 22.

In sum, these ambiguous situations are not freak occurrences affecting only isolated cases. They are almost the norm. True, many noncitizens enter without inspection and are never allowed to apply for lawful status; and other noncitizens enter in lawful immigrant or nonimmigrant status, and always maintain that status. It is not that legality of status or presence is *always* unclear, but that it is *often* unclear.

* * *

Even if DHS's specific analyses of status questions is not flawed in application, its calculus is confusing and complicated. Cases might look similar to the untrained eye, but be treated differently by the agency. DHS's understanding of status does not directly correlate to a noncitizen's likelihood to permanently remain in the United States with government permission.

C. Noncitizens are often ignorant about important aspects of their case.

It may also be relevant to consider the degree to which reasonable noncitizens would understand their actual legal situations. The ferocious complexity of the immigration statutes intersects with an affected populace that is often unrepresented and unlikely to fully and correctly understand those intricacies.

Courts have long recognized the complexity of the immigration laws. *See Lok v. Immigration & Naturalization Serv.*, 548 F.2d 37, 38 (2d Cir. 1977) (noting "the striking resemblance between some of the laws we are called upon to interpret and King Minos's labyrinth in ancient Crete"); *Castro-O'Ryan v. U.S. Dep't*

of Immigration & Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1987) ("With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.' A lawyer is often the only person who could thread the labyrinth.") (citation omitted). As illustrated above, only the thinnest of lines distinguishes between noncitizens who are allowed to remain in the United States in unlawful status, and those considered to be in proper status. That line is sometimes hard to discern even immigration attorneys; it is impossible for many unrepresented noncitizens.

As a concrete example, when Petitioner was admitted into the country, his passport was marked "D/S." Brief of Petitioner 4. This notation means "duration of status." *See USCIS Policy Memorandum PM-602-1060*, *supra*, at 1. An immigration attorney would know the significance of "D/S": that any change in Mr. Rehaif's education plans would affect his legal status. A noncitizen like Mr. Rehaif likely would not understand this notation (and what it signifies) unless someone explained it to him. Given that most nonimmigrants are not represented by counsel, *cf. Castro-O'Ryan*, 847 F.2d at 1312, ignorance about important legal rules is the rule rather than the exception. Knowledge gaps become particularly acute when something relatively complex comes to pass; for Petitioner that occurred when he dropped out of school.[7]

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[7] Petitioner might have sought reinstatement of his status; a 20 page guide can explain the process. U.S. Immigration and Customs Enforcement, *Reinstatement SEVIS User Guide* https://studyinthestates.dhs.gov/sites/default/files/Reinstatement%20User%20Guide_0.pdf.

Of course, ignorance of important data points does not always turn on the statute's complexity. Individual noncitizens might lack awareness of basic facts relevant to their citizenship status for any number of reasons. For instance, it is common for noncitizens brought to the U.S. as young children to discover that they lack U.S. citizenship when they are in high school or when it is time to apply to college. *See, e.g.*, David Martinez, *I didn't know I was undocumented* (Dec. 30, 2014) https://www.cnn.com/2014/06/25/living/david-martinez-undocumented-immigrant-irpt/index.html. It is thus possible that an undocumented youth could accidentally violate § 922(g)(5)(A) if there is no mens rea requirement. Firearms use is not unpopular this country; states grant youth hunting permits. *See* Illinois Department of Natural Resources, *Youth License and Permits*, https://www.dnr.illinois.gov/lpr/pages/youthpermitsfees.aspx. Youth organization such as the Boy Scouts have activities that involve firearms, such as target ranges at summer camps. See Boy Scouts of America, *Shooting Sports Program FAQs*, https://www.scouting.org/outdoor-programs/shooting-sports/shooting-faq/. A middle school student in a scout camp would be unlikely to be federally prosecuted. But it bears noting that if there is no mens rea applicable to the legality of presence, a youth would technically violate the federal gun statute by participating in these activities, in perfect ignorance that he was a noncitizen.

II. LIMITING INTERPRETATIONS NOT INVOLVING MENS REA MIGHT AMELIORATE THESE QUESTIONS.

Amicus would note—though neither party has raised it—that the statute might be construed in ways that would substantially reduce these difficulties. As

Amicus explained *supra* at 3-8, the "illegally or unlawfully" language could be understood in multiple ways. The government argues that a noncitizen's "status" is determinative, but the other options fit at least as well with the statutory text.

First, Congress premised the crime on whether a noncitizen is "illegally or unlawfully *in*" the United States. 18 U.S.C. § 922(g)(5)(A) (emphasis added). The word "in" is generally understood to involve presence. BLACK'S LAW DICTIONARY 683 (5th ed. 1979) ("an elastic preposition... expressing presence"). By contrast, the word "status" involves a "state or condition," and implicates "the legal relation of individual to rest of the community." *Id.* at 1264. Looking only at the text, the legality of "presence" would seem more directly relevant than the legality of "status" to the word "in."

The unlawful presence definition in the statute tends to turn on authorization granted by the federal government for a noncitizen to remain in the United States. This seems to Amicus to fit better with the ordinary and common understanding of being "illegally in" this country, since it would exclude situations when the federal government has officially and explicitly, after due legal proceedings, allowed a noncitizen to remain inside in this country. It seems strange to treat such noncitizens as not lawfully here when they have "increase[d their] identity with our society" by those means permitted by Congress in statute. *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950).

Alternately, the statutory text would better accord with an understanding that § 922(g)(5)(A) applies to criminalized presence. This would generally mean entries without inspection. 8 U.S.C. §§ 1325(a), 1326. Understanding the text that way would avoid notice

problems; a noncitizen who has entered without inspection would generally know of this fact, and would—absent acquisition of some lawful status—understand her presence in the United States to be premised on non-detection. Moreover, applying § 922(g)(5)(A) to noncitizens who enter without inspection would avoid overlap with the prohibition of nonimmigrant entrants possessing firearms. *See* 18 U.S.C. § 922(g)(5)(B). As noted *supra* at 5 at n.5, overstaying a valid nonimmigrant visa, or failing to adhere to the terms of that visa, is not criminal under the INA. Under this alternative approach, the two prongs of § 922(g)(5) would apply to non-overlapping sets. The statute would apply neatly to bar gun ownership in § 922(g)(5)(A) to individuals who entered the U.S. without inspection (unless they thereafter obtain legal permission to remain) and at § 922(g)(5)(B) to those who enter on nonimmigrant visas. This simpler view of the statute would eliminate many or most difficult of the mens rea questions otherwise posed by the statute.

Even if the text of the statute did not require either of these readings, the canon of lenity would support one of these alternate understandings. Under that well-known rule, an ambiguous criminal statute must be construed narrowly, in favor of the accused. *See United States v. Bass*, 404 U.S. 336, 347 (1971). The illegal "status" concept broadens criminal liability and may not always provide "fair notice to those subject to the criminal laws." *United States v. Kozminski*, 487 U.S. 931, 952 (1988). This is out of keeping with jurisprudence of long standing, which requires "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U. S. 25, 27 (1931). Because these

alternate constructions are plausible, and would better accord with these principles, the Court may choose to resolve this case on those alternate grounds.

III. FAILURE TO FOLLOW AGENCY RULES IS NOT CRIMINAL UNLESS EXPLICITLY MADE SO IN STATUTE.

The ordinary corollary for complex and ambiguous laws administered by agencies is deference to agency interpretations. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 985 (2005). But federal prosecutions are the province of Article III courts, not administrative agencies. *Gomez v. United States*, 490 U.S. 858, 876 (1989); *see also Wong Wing v. United States*, 163 U.S. 228 (1896). This creates a tension: "criminal laws are for courts, not for the Government, to construe." *Abramski v. United States*, 134 S. Ct. 2259, 2274 (2014).

It is true that Congress may premise criminal liability on violating an agency's rules and regulations. *See United States v. Grimaud*, 220 U.S. 506 (1911) (illegal to violate regulations issued by the Secretary of Agriculture); *Touby v. United States*, 500 U.S. 160 (1991); *United States v. O'Hagan*, 521 U.S. 642 (1997). But criminal liability attaches only where Congress speaks clearly; it does not attach "where a statute does not distinctly make the neglect in question a criminal offense." *United States v. Eaton*, 144 U.S. 677, 688 (1892).

Congress could certainly make a § 922(g)(5)(A) violation turn on violation of agency rules. For instance, 8 U.S.C. § 1324a(f)(1) imposes criminal liability for employment of noncitizens not authorized by the Attorney General to be employed, under certain circumstances. *See* 8 U.S.C. § 1324a(h)(3); *see also* 8 U.S.C. §

1326(a)(2) (imposing criminal liability for reentry unless Attorney General "expressly consents" to the reentry). But § 922(g)(5)(A) makes no reference to agency rules or decision-makers. A generic reference to being lawfully "in" the United States is not sufficient to impose liability for violating an agency's rules; "[r]egulations... may... have, in a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense." *Eaton*, 144 U.S. at 688.

Moreover, the Government's theory would make criminal violations turn on agency rules and interpretations about status, interpretations that are not fixed in stone. The Government's theory "would allow one administration to criminalize conduct..., the next administration to decriminalize it, and the third to recriminalize it, all without any direction from Congress." *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 729 (6th Cir. 2013) (Sutton, J., concurring). If Congress wishes to adopt that approach in § 922(g)(5)(A), it may do so, but it must say so clearly.

Since Congress has not spoken clearly to impose § 922(g)(5)(A) punishment on violation of civil immigration rules, these principles suggest that the Court should adopt an interpretation of the statute which does not depend on the agency's regulatory or subregulatory rules. But at a minimum, these principles would seem to require the Government to prove that an individual knows of their status violation in order to subject them to criminal punishment.

CONCLUSION

Immigration law is rarely simple. Applying the agency's view of when immigration "status" is lawful

implicates confusing and unclear questions, matters about which defendants might reasonably be unsure. This is sufficient to require a mens rea requirement. Moreover, the Government's view would appear to require deferring to the agency's views on status, in the absence of an explicit statutory statement to that effect. Amicus sets forth two alternate constructions which might simplify judicial inquiries under § 922(g)(5)(A). The Court may wish to consider adopting one of those limiting constructions, as well as requiring a knowing *mens rea* as to the question presented in the case.

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